disparate impact against other regulatory concerns that affect the public as a whole. *See* Pet. 6. The federal courts cannot. If they are to apply disparate-impact liability to insurance pricing under the MFA, they must rule based on the law and the evidence. Although respondents dispute (Opp. 3 n.1) our observation (Pet. 18) that courts adjudicating disparate-impact lawsuits have "no broad warrant to consider the public interest" but may only adjudicate the rights of the private litigants before the court, this Court has long mandated this approach when applying statutes.[4] "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with common sense and the public weal." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978) (internal quotation marks omitted); *see also id.* at 187 (courts may not take into account "the burden on the public" because they have no "authority to make such fine utilitarian calculations"). Respondents naïvely assume that courts can somehow apply the brakes to federal disparate-impact lawsuits and thereby mimic state regulators' concern for the public interest. In fact, no federal court can do so without overstepping its constitutional bounds.

3. State Law Offers Respondents No Support

Respondents suggest that disparate-impact suits challenging insurance pricing could proceed under *state* law (Opp. 14-15), but they appear to misunderstand the state laws that they cite. As we have noted (Pet. 19 n.18), Texas does have its own fair housing act. Respondents speculate that, because the Texas law resembles the federal FHA, the

---

[4] *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), does not say otherwise. Indeed, this Court *rejected* the court of appeals' reliance on "public policy" to justify a deviation from accepted principles of res judicata. *Id.* at 401. The Court noted that "[s]imple justice is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Id.* (internal quotation marks omitted).

Texas law would necessarily allow a disparate-impact suit to go forward if the federal law would. But that argument does not answer the question before this Court—it begs it. Forgetting that their claim pushes the FHA into uncharted territory, respondents assume the answer to the very question that they seek to have resolved in their favor. In fact, no court of appeals—not even the court below—has held that the FHA should be construed to allow disparate-impact suits challenging insurance ratemaking.[5] Given the uncertainty regarding the proper application of *federal* housing law to insurance, the existence of a similar *state* law does not resolve the question.[6] Enacted "to protect state regulation primarily against *inadvertent* federal intrusion," *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996), the MFA is particularly important where, as here, the federal claim advances a highly novel interpretation of federal law.

Respondents also misapprehend our argument regarding Texas Insurance Code article 21.21-6, which proscribes discrimination in insurance practices based on race, color, religion, national origin, age, gender, marital status, geographic location, or disability. Respondents state that, "contrary to Allstate's assertion (Pet. 19), under Texas law, there is no actuarial defense to race discrimination claims[.]" Opp. 14. This is not "contrary to" our argument; it *is* our argu-

---

[5] The court below held only that the MFA did not preempt respondents' claim. It did not rule whether the FHA establishes disparate-impact liability in the insurance context. *See* Pet. 15 n.15; *see also* Pet. App. 2a ("The preemptive effect of the [MFA] constitutes the sole point of appeal."), 12a ("We conclude, therefore, that the MFA does not preclude [respondents'] claims.").

[6] Although respondents argue that such state fair housing laws are virtually identical to federal law, they have notably brought no claim under these state laws. Furthermore, respondents have failed to identify, and petitioners are unable to locate, *any* case applying a disparate-impact theory of liability under Texas' fair housing act, much less a case applying such a theory in the insurance context.

ment. As the petition explains (Pet. 19), the absence of an actuarial defense to race discrimination claims (as opposed to claims alleging discrimination based upon age, gender, marital status, geographic location, or disability) demonstrates that the statute reaches only *intentional* racial discrimination, and does not impose disparate-impact liability. Without an actuarial defense to a disparate-impact suit, the defendant would lose every time that a plaintiff could show that a practice affects members of one race more adversely than members of another—an absurd result.

The very fact that Texas, unlike the federal government, has enacted a law specifically addressing insurance discrimination, and providing for actuarial defenses in contexts other than racial discrimination, indicates strongly that Texas' general fair housing act would not be interpreted to trump the provisions of the Texas insurance law. To the extent Florida law may be relevant, the same reasoning applies to its fair housing act, which resembles Texas'.[7] In any event, however state laws are to be reconciled, that question should be resolved by state officials, not federal courts.

Finally, respondents stumble on the recently-enacted Texas law that expressly authorizes credit scoring. *See* Pet. 8-9. Respondents argue that this law "do[es] not apply retroactively." Opp. 15. Respondents, however, seek *prospective* relief enjoining petitioners from future use of credit scoring. Such relief would plainly violate all three prongs of the *Humana* test. *See* Pet. 20. Respondents also ignore this law when they argue that petitioners press this appeal to "avoid disclosure of [their] race-based credit formula." Opp. 3. In fact, the new law *requires* that insurers disclose their

---

[7] As we have noted (Pet. 9-10 n.11), Texas law is most directly relevant because the only plaintiffs who purchased homeowners insurance from Allstate are Texas residents. The Florida plaintiffs purchased only automobile insurance and thus cannot proceed under the FHA. Respondents seek certification of a nationwide class action, but such a prospect only establishes that federal disparate-impact liability for insurance pricing could impair the administrative regime of 50 States, not just one.

credit scoring formula to state regulators. *See* Tex. Ins. Code art. 21.49-2U § 9. Upon disclosure, the formula becomes public information. *Id.* § 10.[8] And the Texas Insurance Commissioner has always enjoyed broad subpoena power to require the production of relevant records. *See* Tex. Ins. Code § 36.152.

4. The MFA Question Is Properly Presented And Warrants Review

Contrary to respondents' contention (Opp. 5-6, 12), the question whether the MFA precludes disparate-impact suits (as distinct from disparate-treatment suits) under the FHA in the insurance-pricing context was both raised and decided below. This argument occupied over five pages of petitioners' brief to the court of appeals, under the heading "Plaintiffs' Disparate Impact Claims are Particularly Subject to Preemption." Pet. C.A. Br. 21-26. The court of appeals squarely passed on this argument as well. After noting that petitioners "argue that disparate impact claims are particularly likely to impair state law," the majority concluded that it "d[id] not agree" and criticized the dissent for "reiterat[ing] [petitioners'] argument" without "offer[ing] ... more convincing evidence that disparate impact suits will necessarily impair state insurance regulation." Pet. App. 11a n.7. The issue is therefore properly before this Court. *See United States* v. *Williams*, 504 U.S. 36, 41-43 (1992).

Respondents are equally misguided in suggesting (Opp. 4-6, 11-12) that the fact that this petition arises out of a motion to dismiss somehow renders this petition unsuitable for review. Neither the district court, which granted respondents' motion for leave to file an interlocutory appeal, nor the court of appeals suggested that its determination was hampered by the lack of record. This petition raises ques-

---

[8] As *amici* pointed out below, other States have also mandated that insurers relying on credit data submit all related materials, including mathematical formulas, to the State's insurance department for approval. *See* AAI C.A. Amicus Br. 16 n.24 (Indiana, New Mexico, Virginia).

tions of law, not fact. Petitioners do not ask this Court to evaluate the wisdom or fairness of credit scoring, but only that the Court recognize that the MFA entrusts that very determination to expert state regulators and politically accountable state legislatures rather than federal lay juries.

On the other hand, allowing this case to proceed to trial would set a dangerous precedent, encouraging future nationwide class actions by plaintiffs emboldened to extract what Judge Friendly called "blackmail settlements."[9] If the court of appeals' decision remains in force, its ramifications will extend far beyond the judicial opinions that cite it, as risk-averse defendants may choose to change their underwriting practices in the face of threatened litigation, rather than endure costly and intrusive trials. In this way, the threat of litigation will effectively shift the power to regulate insurance away from state commissioners, who are charged with regulating in the public interest, to litigants pursuing private concerns. Disparate-impact suits will thus interfere with state administrative regimes silently and stealthily, by settlement rather than by verdict, but to the same pernicious effect. Given the exceptional importance of this issue, this Court should not—and need not—delay its resolution.

Respectfully submitted,

---

[9] Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *see also Parker* v. *Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that the "*in terrorem* effect" of a "potentially enormous aggregate recovery for plaintiffs" may "induce unfair settlements"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that "class certification creates insurmountable pressure on defendants to settle" because "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting that a "small probability of an immense judgment in a class action" produces "intense pressure to settle").

TONY P. ROSENSTEIN
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, TX 77002
(713) 229-1582

JEFFREY LENNARD
SONNENSCHEIN NATH
& ROSENTHAL LLP
8000 Sears Tower
233 South Wacker Drive
Chicago, IL 60606
(312) 876-8000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
ERIC R. COLUMBUS
WILMER CUTLER PICKERING LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

APRIL 2004